

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SANDRA G. SHAFFER,
Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner of Social
Security,

Defendant.

No. CV-09-0046-CI

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT
AND DENYING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 13, 16.) Attorney Maureen J. Rosette represents Plaintiff; Special Assistant United States Attorney Terrye E. Shea represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 8.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment, and remands the matter to the Commissioner for additional proceedings pursuant to sentence four 42 U.S.C. § 405(g).

JURISDICTION

On June 5, 2006, Sandra G. Shaffer (Plaintiff) protectively filed applications for Disability Insurance benefits (DIB) and Social Security Income (SSI) benefits. (Tr. 15.) Plaintiff alleged disability due to mental health issues of depression, anxiety, and bi-polar disorder with an alleged onset date of July 12, 2004. (Tr. 116, 131.) Benefits were denied initially and on reconsideration.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT - 1

1 Plaintiff requested a hearing before an administrative law judge
2 (ALJ), which was held before ALJ Hayward Reed on August 8, 2007.
3 (Tr. 25-81.) Plaintiff, who was represented by counsel, testified.
4 In addition, medical expert Scott Mabel, Ph.D.; vocational expert
5 Fred Cutler (VE); and Plaintiff's long time friend, Donna Holt
6 testified. (Tr. 25.) The ALJ denied benefits on January 15, 2008,
7 and the Appeals Council denied review. (Tr. 4-6, 15-28.) The
8 instant matter is before this court pursuant to 42 U.S.C. § 405(g).

9 **STATEMENT OF THE CASE**

10 The facts of the case are set forth in detail in the transcript
11 of proceedings and are briefly summarized here. Plaintiff was 55
12 years old at the time of the hearing. (Tr. 50.) She was married
13 with adult children. She had obtained sufficient college credits
14 for a bachelor's degree by taking on-line classes for about 20
15 years. (Tr. 50, 64.) Plaintiff has past work experience as an adult
16 caregiver, home health aide, psychiatric aide, and child monitor,
17 estate executrix. (Tr. 186.) She testified she could no longer
18 work because of unpredictable and extended episodes of fatigue,
19 anxiety and depression. (Tr. 50-52.)

20 **ADMINISTRATIVE DECISION**

21 ALJ Reed found Plaintiff met insured status requirements for
22 DIB benefits through March 31, 2009. (Tr. 15.) At step one, he
23 found Plaintiff had not engaged in substantial gainful activity
24 since the alleged onset date of July 1, 2004. (*Id.*) At step two,
25 he found Plaintiff had the severe impairments degenerative disk
26 disease, depression and anxiety, and non-severe impairments of
27 "Epstein-Warre virus, hip pain, hypothyroid, mild hypertension, TMJ,
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1 and bilateral high frequency hearing loss." (Tr. 17-18.) He noted
2 that although there was objective medical evidence of severe
3 impairment of the cervical spine, "there is no evidence of follow-up
4 treatment by her treating physician or specialist," and it was
5 "impossible to determine the effect of this impairment on the
6 claimant's residual functional capacity." (Tr. 18.) The ALJ did
7 not consider the cervical spine impairment in his RFC determination.
8 (*Id.*)

9 At step three, ALJ Reed found Plaintiff's impairments, alone or
10 in combination, did not meet or medically equal an administratively
11 recognized level impairment listed in Appendix 1, Subpart P,
12 Regulations No. 4 (Listings). (*Id.*) ALJ Reed determined Plaintiff
13 had the residual functional capacity (RFC) to perform a full range
14 of work at all exertional levels, with the following non-exertional
15 limitations: she "is moderately limited in her ability to work in
16 coordination with or proximity to others without being distracted by
17 them;" she "may exhibit behavior extremes" and "she would be able to
18 work with the general public on a brief basis." (Tr. 19.) The ALJ
19 found Plaintiff's statements regarding the intensity of her symptoms
20 were not entirely credible. (Tr. 20.) At step four, after
21 considering the VE's testimony, the ALJ found Plaintiff could still
22 perform her past work as a home health aide and child monitor. He
23 concluded she was not "disabled," as defined by the Social Security
24 Act, during the alleged period of disability. (Tr. 23.)

25 STANDARD OF REVIEW

26 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
27 court set out the standard of review:

1 A district court's order upholding the Commissioner's
 2 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
 3 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
 4 Commissioner may be reversed only if it is not supported
 5 by substantial evidence or if it is based on legal error.
 6 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
 7 Substantial evidence is defined as being more than a mere
 8 scintilla, but less than a preponderance. *Id.* at 1098.
 9 Put another way, substantial evidence is such relevant
 10 evidence as a reasonable mind might accept as adequate to
 11 support a conclusion. *Richardson v. Perales*, 402 U.S.
 12 389, 401 (1971). If the evidence is susceptible to more
 13 than one rational interpretation, the court may not
 14 substitute its judgment for that of the Commissioner.
 15 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner*, 169
 16 F.3d 595, 599 (9th Cir. 1999).

17 The ALJ is responsible for determining credibility,
 18 resolving conflicts in medical testimony, and resolving
 19 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
 20 Cir. 1995). The ALJ's determinations of law are reviewed
 21 *de novo*, although deference is owed to a reasonable
 22 construction of the applicable statutes. *McNatt v. Apfel*,
 23 201 F.3d 1084, 1087 (9th Cir. 2000).

14 SEQUENTIAL PROCESS

15 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
 16 requirements necessary to establish disability:

17 Under the Social Security Act, individuals who are
 18 "under a disability" are eligible to receive benefits. 42
 19 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
 20 medically determinable physical or mental impairment"
 21 which prevents one from engaging "in any substantial
 22 gainful activity" and is expected to result in death or
 23 last "for a continuous period of not less than 12 months."
 24 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
 25 from "anatomical, physiological, or psychological
 26 abnormalities which are demonstrable by medically
 27 acceptable clinical and laboratory diagnostic techniques."
 28 42 U.S.C. § 423(d)(3). The Act also provides that a
 claimant will be eligible for benefits only if his
 impairments "are of such severity that he is not only
 unable to do his previous work but cannot, considering his
 age, education and work experience, engage in any other
 kind of substantial gainful work which exists in the
 national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,
 the definition of disability consists of both medical and
 vocational components.

In evaluating whether a claimant suffers from a

1 disability, an ALJ must apply a five-step sequential
2 inquiry addressing both components of the definition,
3 until a question is answered affirmatively or negatively
4 in such a way that an ultimate determination can be made.
5 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
6 claimant bears the burden of proving that [s]he is
7 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
8 1999). This requires the presentation of "complete and
9 detailed objective medical reports of h[is] condition from
10 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
11 404.1512(a)-(b), 404.1513(d)).

12 It is the role of the trier of fact, not this court, to resolve
13 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
14 supports more than one rational interpretation, the court may not
15 substitute its judgment for that of the Commissioner. *Tackett*, 180
16 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
17 Nevertheless, a decision supported by substantial evidence will
18 still be set aside if the proper legal standards were not applied in
19 weighing the evidence and making the decision. *Browner v. Secretary*
20 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
21 there is substantial evidence to support the administrative
22 findings, or if there is conflicting evidence that will support a
23 finding of either disability or non-disability, the finding of the
24 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
25 1230 (9th Cir. 1987).

26 ISSUES

27 The question is whether the ALJ's decision is supported by
28 substantial evidence and free of legal error. Plaintiff argues the
ALJ erred when he (1) failed to provide specific and legitimate
reasons for rejecting her examining psychologist's opinions, (2)
improperly relied on the non-examining medical expert's opinion, and
(3) improperly disregarded opinions from her mental health

1 providers. She further contends the ALJ's mental RFC findings were
2 not supported by the evidence. (Ct. Rec. 14.)

3 DISCUSSION

4 A. Evaluation of Acceptable Medical Source Opinions

5 Plaintiff argues the ALJ improperly rejected the medical
6 opinions of examining psychologist Kayleen Islam-Zwart, Ph.D., who
7 examined Plaintiff in July 2006. She contends that mental
8 limitations assessed by Dr. Islam-Zwart, if properly credited,
9 would support a finding of disability. (Ct. Rec. 14 at 15-17.)

10 In disability proceedings, an examining physician or
11 psychologist's opinion is given more weight than that of a non-
12 examining physician. *Benecke v. Barnhart*, 379 F.3d 587, 592 (9th
13 Cir. 2004). If an examining psychologist's opinion is not
14 contradicted, it can be rejected only with "clear and convincing"
15 reasons. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). When
16 rejecting conflicting examining or treating medical source opinions,
17 the ALJ must "make findings setting forth specific, legitimate
18 reasons for doing so that are based on substantial evidence in the
19 record." *Sprague*, 812 F.2d at 1230; see also *Flaten v. Secretary of*
20 *Health and Human Services*, 44 F.3d 1453, 1463 (9th Cir. 1995).

21 To meet this burden, the ALJ can set out "a detailed and
22 thorough summary of the facts and conflicting clinical evidence,
23 stating his interpretation thereof, and making findings." *Cotton v.*
24 *Bowen*, 799 F.2d 1403, 1408 (9th Cir. 1986). Historically, the
25 courts have recognized conflicting medical evidence, the absence of
26 regular medical treatment during the alleged period of disability,
27 and the lack of medical support for doctors' reports based
28 substantially on a claimant's subjective complaints, as specific,

1 legitimate reasons for disregarding an examining physician's
2 opinion. *Flaten*, 44 F.3d at 1463-64; *Fair v. Bowen*, 885 F.2d 597,
3 604 (9th Cir. 1989).

4 On July 31, 2006, Dr. Islam-Zwart evaluated Plaintiff based on
5 an interview and the results of the following objective
6 psychological tests: Mental Status Examination; Trails A and B;
7 Fifteen Item Memory Test; and the Personality Assessment Inventory.
8 (Tr. 263-64.) The results were interpreted in Dr. Islam-Zwart's
9 narrative report, and summarized in a psychological/psychiatric
10 report form. (Tr. 258-61.) Based on the interview and objective
11 data collected, moderate severity was assessed in these categories:
12 depressed mood; verbal expression of anxiety/fear; and global
13 illness. (Tr. 259.) Dr. Islam-Zwart did not find evidence of
14 malingering or invalid test results. (Tr. 264.) She assessed
15 moderate functional limitations in Plaintiff's ability to exercise
16 judgment and make decisions; relate appropriately to co-workers and
17 supervisors; interact appropriately in public contacts; care for
18 personal hygiene and appearance; and control motor movements and
19 maintain appropriate behavior. (Tr. 260.) She also found Plaintiff
20 had marked limitations in her ability to respond and tolerate
21 pressures of a normal work setting. (*Id.*)

22 The ALJ briefly discussed Dr. Islam's Zwart's report, and gave
23 it "little weight" because it was prepared for another agency. (Tr.
24 22.) However, "the purpose for which medical reports are obtained
25 does not provide a legitimate basis for rejecting them." *Lester*, 81
26 F.3d at 832. Further, the ALJ's reasoning that Dr. Islam-Zwart's
27 opinions do not merit "controlling weight," is not sufficiently
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1 specific to reject her entire assessment.¹ While it is true that an
2 ALJ need not accept medical opinions that are brief, conclusory and
3 unsupported by clinical findings, *Thomas v. Barnhart*, 278 F.3d 947,
4 957 (9th Cir. 2002), Dr. Islam-Zwart's findings are explained in a
5 narrative report and supported by objective testing; therefore, the
6 ALJ must explain with specificity which opinions he is rejecting and
7 give legitimate reasons, supported by the record, for doing so. See,
8 e.g. *Flaten*, 44 F.3d at 1463-64 (listing specific and legitimate
9 reasons for disregarding examining doctors' opinions). Finally, the
10 GAF² score of 60, cited by the ALJ as inconsistent with claims of
11 a complete inability to work (Tr. 22), is consistent with the
12 unrejected, moderate limitations assessed by Dr. Islam-Zwart and
13 consistent with Plaintiff's subjective complaints throughout the
14 record. (See, e.g., Tr. 233, 241-42, 262-63, 275, 358, 360.) The
15 fact that a GAF score assessed at the time of examination does not
16 support a finding of total disability does not warrant total

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18 ¹ Although the ALJ found Plaintiff's statements regarding the
19 severity and intensity of her symptoms "not entirely credible," he
20 did not reject her statements entirely. (Tr. 20.)

21 ² The Global Assessment of Functioning (GAF) scale is a common
22 tool for tracking and evaluating the overall psychological
23 functioning of a patient. A score of 51-60 indicates "moderate
24 symptoms (e.g., flat affect and circumstantial speech, occasional
25 panic attacks) OR moderate difficulty in social, occupational, or
26 school functioning (e.g., no friends, unable to keep a job.)"
27 DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION (DSM-IV),
28 at 32 (1995).

1 rejection of Dr. Islam-Zwart's opinions regarding Plaintiff's non-
2 exertional limitations. The ALJ erred in his rejection of Dr.
3 Islam-Zwart's evaluation.

4 Plaintiff also contends the ALJ erred in relying on medical
5 expert Dr. Mabel's testimony. (Ct. Rec. 14 at 15.) The analysis
6 and opinion of a non-examining medical expert selected by the ALJ
7 may be helpful in his adjudication. *Andrews*, 53 F.3d at 1041.
8 However, medical expert testimony may serve as substantial evidence
9 only when supported by other competent evidence in the record. *Id.*
10 The opinion of a non-examining medical source "cannot by itself
11 constitute substantial evidence" sufficient to reject the opinion of
12 an examining medical source. *Lester*, 81 F.3d at 831.

13 Here, Dr. Mabel opined that Plaintiff suffered from depression
14 and anxiety that caused mild to moderate limitation in concentration
15 persistence, and pace, and her primary difficulty would be
16 interacting with co-workers. He also opined Plaintiff would not
17 have problems working with the general public "for brief periods of
18 time." (Tr. 45.) He declined to opine regarding the marked
19 limitation assessed by Dr. Islam-Zwart, stating that his review of
20 the entire record led him to opine that Plaintiff "had some moderate
21 difficulties in tolerating workplace pressures, in particular
22 interpersonal relationships." (Tr. 47-49.)

23 The ALJ gave significant weight to Dr. Mabel's testimony. (Tr.
24 21.) However, this non-examining psychologist testimony, based on
25 a review of the record, is not substantial evidence to reject Dr.
26 Islam-Zwart's opinions, which were based on an interview and
27 objective testing. *Lester*, 81 F.3d at 831. Further, the ALJ erred
28 when he did not identify other evidence in the record, from

1 examining or treating medical sources, that supports the limitations
2 assessed by Dr. Mabel. (*Id.*) The ALJ's evaluation of Dr. Islam-
3 Zwart's opinions and reliance on Dr. Mabel's testimony are based on
4 legal error and cause for remand. See *Lester*, 81 F.3d at 831-32.

5 **B. Step Four - RFC Findings and Past Relevant Work**

6 At step four, the Commissioner makes RFC findings, and
7 determines if a claimant can perform past relevant work. Although
8 the burden of proof lies with the claimant at step four, the ALJ
9 still has a duty to make the requisite factual findings to support
10 his conclusion. *Social Security Ruling (SSR)* 82-62. This is done
11 by looking at the "residual functional capacity and the physical and
12 mental demands" of the claimant's past relevant work. 20 C.F.R. §§
13 404.1520(a)(4)(iv) and 416.920(a)(4)(iv). The Commissioner has
14 defined the RFC as is an "assessment of an individual's ability to
15 do sustained work-related physical and mental activities in a work
16 setting on a regular and continuing basis," i.e., for eight hours a
17 day for five days a week, or an equivalent work week. *SSR* 96-8p.
18 Past relevant work is work performed in the last 15 years, lasted
19 long enough to learn it and was substantial gainful employment. *SSR*
20 82-61. In a step four finding that an individual has the capacity
21 to perform a past relevant job, the decision must contain among the
22 findings the following specific findings of fact:

23 1. A finding of fact as to the individual's residual
24 functional capacity;

25 2. A finding of fact as to the physical and mental demands of
26 the past job/occupation; and

27 3. A finding of fact that the individual's residual
28 functional capacity would permit a return to his or her past job or

1 occupation. SSR 82-62.

2 These findings must be based on the evidence in the record and
3 must be developed and fully explained in the disability decision.
4 Evidence of the physical and mental requirements of a particular job
5 may be found in the DICTIONARY OF OCCUPATIONAL TITLES, other
6 administratively recognized publications, or vocational expert
7 testimony. SSR 82-61. Vocational experts are used most often at an
8 ALJ hearing. SSR 00-4p. Step four requires specific findings on
9 all three points sufficient "to insure that the claimant really can
10 perform his past relevant work." *Pinto v. Massanari*, 249 F.3d 840,
11 845 (9th Cir. 2001); see also SSR 00-4p.

12 At the hearing, the VE testified that based on the written
13 record and Plaintiff's hearing testimony, Plaintiff had past
14 relevant work as a home health aide, psychiatric aide and child
15 monitor. (Tr. 73, 186.) Based on the hypothetical individual
16 described by the ALJ, the VE testified the individual could perform
17 the home health aide and child monitor job. (Tr. 76.) The ALJ
18 found Plaintiff could still perform these jobs. (Tr. 23.) However,
19 the ALJ made no findings regarding the mental demands of these jobs,
20 both of which are classified as "medium work," and require
21 consistent interaction with either elderly, convalescent or
22 handicapped adults or small children. *Dictionary of Occupational*
23 *Titles (DICOT)*, 4th ed., rev. 1991, 354.377-014, 301.377-010. The
24 ALJ's failure to provide detailed step four findings, including an
25 explanation of (1) the mental demands of a claimant's past work with
26 children and the elderly, and (2) how the identified mental
27 limitations would impact her ability to meet these demands, is
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1 reversible error.³ See *Pinto*, 249 F.3d at 845.

2 In addition, the ALJ erred when he relied on the VE testimony
3 regarding past work. Specifically, the ALJ's hypothetical did not
4 include the moderated and marked limitations assessed by Dr. Islam-
5 Zwart's and unrejected by the ALJ. Failure to include all
6 unrejected limitations supported by the record is reversible error.
7 See *Magallanes v. Bowen*, 881 F.2d 747, 756 (9th Cir. 1989); *Embrey v.*
8 *Bowen*, 849 F.2d 418, 422 (9th Cir. 1988) (VE testimony has no
9 evidentiary value if hypothetical question is not supported by
10 substantial evidence). It is also noted that the ALJ's hypothetical
11 question to the VE described an individual with moderate limitations
12 in her ability to work "in coordination with or proximity to others
13 without being distracted by them, or in terms of exhibiting
14 behavioral extremes," and who could work "with the general public on
15 a brief basis." (Tr. 75.) There is no explanation in the ALJ's
16 decision as to how an individual with these mental limitations would
17 retain the ability to monitor children or care for the elderly,
18 handicapped or convalescing population, as the job is described in
19 the *DICOT*.

20 The ALJ's reliance on the VE testimony based on an incomplete
21 hypothetical is legal error, and his findings at step four that
22 Plaintiff can still do her past work, are not supported by
23 substantial evidence.

24 Finally, the medical evidence indicates Plaintiff's cervical
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26 ³ The regulations advise the ALJ to consider first how a job
27 is actually performed based on and, then, how a job is usually
28 performed as defined by the *DICOT*. SSR 82-61.

1 spine degenerative arthritis is marked and severe, and the record
2 shows that Plaintiff reported chronic neck pain and headaches. (Tr.
3 360-61, 363.) Because Plaintiff's past work is performed at medium
4 exertion, the ALJ's step four findings assume Plaintiff still has
5 the ability to exert 20 to 50 pounds of force. *DICOT* 354.377-014,
6 301.377-010; *SSR* 83-10. However, the ALJ acknowledged in his
7 decision that the record was inadequate to evaluate evidence of
8 physical impairments. (Tr. 18.) The Regulations provide that a
9 consultative examination is normally required where "there is an
10 indication of change in your condition that is likely to affect your
11 ability to work, but the current severity of your impairment is not
12 established." 20 C.F.R. §§ 404.1519a(b)(4) and (5); 416.919(b)(4)
13 and (5). Thus, the ALJ erred in not obtaining a consultative
14 physical examination to assess the degree of exertional limitation
15 caused by the medically determinable severe degenerative disk
16 disease, and factor those results into his RFC determination. The
17 ALJ's failure to develop the record further is cause for remand.
18 *Mayes v. Massanari*, 276 F.3d 453, 4509-60 (9th Cir. 2001) (*citing*
19 *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001)).

20 **C. Remedy**

21 Where evidence has been identified that may be a basis for a
22 finding, but the findings are not articulated, remand for additional
23 proceedings is the proper disposition. See *Gonzalez v. Sullivan*,
24 914 F.2d 1197, 1202 (9th Cir. 1990). Further, remand for additional
25 proceedings is proper where, as here, there are issues that must be
26 resolved relating to Plaintiff's exertional capacity; the record
27 must be developed further; and step five findings may be necessary.
28 See *Smolen v. Chater*, 80 F.3d 1273, 1291-92 (9th Cir. 1996).

1 Accordingly,

2 **IT IS ORDERED:**

3 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is
4 **GRANTED** and the matter is remanded to the Commissioner for
5 additional proceedings consistent with the decision above and
6 pursuant to sentence four of 42 U.S.C. § 405(g);

7 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 16**) is
8 **DENIED;**

9 3. Application for attorney's fees may be filed by separate
10 motion.

11 The District Court Executive is directed to file this Order and
12 provide a copy to counsel for Plaintiff and Defendant. Judgment
13 shall be entered for **PLAINTIFF** and the file shall be **CLOSED**.

14 DATED October 29, 2009.

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16 S/ CYNTHIA IMBROGNO
17 UNITED STATES MAGISTRATE JUDGE
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